FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 248

FLOYD FARMER, Administrator of the Estate of Donald Lewis Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

WILLIE FARMER, Administrator of the Estate of Thomas Donald Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

FYKE FARMER,
1111 American Trust Building,
Nashville 3, Tennessee,
Attorney for Petitioners.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions below	2
Jurisdiction	3
Questions presented	3
Constitutional provisions and statute involved	4
Statement of the case	5
The case based on the Tennessee Railroad Precautions Act	5
Conflict in evidence as to train speed	8
A. Evidence relied upon by the plaintiffs that the train was travelling at a speed of 60 miles per hour	8
B. Evidence relied upon by the defendant railroad that the train speed was not in excess of 30 miles per hour	9
Evidence tending to show that engineer and fireman were not keeping attentive lookout ahead	10
Proceedings in District Court after verdict and prior to entry of judgment	10
The judgment and rulings of the successor Judge	13
Judgment of Court of Appeals	14
Argument	15
The controlling rules of law	15
The law of the case as declared by the Court of Appeals	16
A. As respects the lookout duty	16
B. As respects the speed of the train and the defense of impossibility of compliance with the statute and unavoidableness of the accident	18

How petitioners were prejudiced by judgments entered by Judge who did not preside at trial..... 19

The Court of Appeals' misconception of the duty of the trial judge as regards weighing the evidence in deciding whether verdict should be set aside... 21

Decisions of other Courts of Appeals..... 23

Applicable decisions of this court..... 26

Rule 63 and the Seventh Amendment..... 28

Reasons relied on for granting the writ..... 33

Prayer 34

Cases Cited.

Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350 24

Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U. S. ..., 2 L. ed. 2d 953, 964, 78 S. Ct. 26

Capital Traction Co. v. Hof, 174 U. S. 1, 18 S. Ct. 580, 43 L. ed. 873 27

Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212, 67 S. Ct. 752, 91 L. ed. 849..... 26

Dyer v. MacDougal et al., 201 F. 2d 265, 272..... 30-31

Eastern Airlines, Inc., v. Union Trust Co., 230 F. 2d 25, 99 U. S. App. D. C. 205, certiorari denied, 77 S. Ct. 816, 353 U. S. 942, 1 L. Ed. 760..... 24

Felton v. Spiro, 78 Fed. 576 ..... 21, 32

Garrison v. United States, 62 F. 2d 41..... 24

General American Life Ins. Co. v. Central Nat. Bank of Cleveland (C. A. 6th), 136 F. 2d 821..... 22

L. & N. Ry. Co. v. Farmer, 220 F. 2d 90, and 224 F. 2d 599 (opinion on rehearing)..... 2, 9, 10, 17

Langnes v. Green, 282 U. S. 531, 541, 51 S. Ct. 243, 75 L. ed. 520 28

Magee v. General Motors Corp., 213 F. 2d 899..... 23

Marsh v. Illinois Central R. Co., 175 F. 2d 498..... 24, 32

McCracken v. Richmond, Fredericksburg & Potomac Ry. Co., 240 F. 2d 484 24
Meldrum v. U. S., 146 Fed. 390, affirmed in 151 Fed. 177 28
Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463 21
Parsons v. Bedford, Breedlove & Robeson, 3 Pet. 433, 7 L. ed. 732 24
Roedigar v. Phillips, 85 F. 2d 995 24
Snead v. New York Central Ry. Co., 216 F. 2d 169 ..... 24, 32
Sou. Pac. Ry. Co. v. Guthrie, 186 F. 2d 926 ..... 24, 32
United States v. Nugent, 100 F. 2d 215, certiorari denied sub nom. Fidelity & Columbia Trust Co. v. U. S., 306 U. S. 648, 59 S. Ct. 591, 83 L. ed. 1046 31
U. S. v. Johnson, 327 U. S. 106, 66 S. Ct. 464, 90 L. ed. 562, rehearing denied 327 U. S. 817, 66 S. Ct. 699, 90 L. ed. 1040 31
Walker v. New Mexico and Southern Pacific Railroad Company, 165 U. S. 593, 17 S. Ct. 421, 41 L. ed. 837 26

Statutes Cited.

Act of June 19, 1934, Chap. 651 4
Code of Tennessee, Sec. 2628 (4) 5
28 U. S. C. 1254 (1) 3
28 U. S. C. A., Sec. 2072 29

Textbooks Cited.

Barron & Holtzoff's Federal Practice and Procedure (Rules Edition), Vol. 3, Sec. 1302.1 29
Hale's History of the Common Law, Chap. 12 27
Moore's Fed. Prac., Vol. 7, par. 63.05 31

Miscellaneous Cited.

Rule 63, Rules of Civil Procedure 4, 28, 29, 33
Seventh Amendment, United States Constitution 3, 4, 27, 28, 33

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. .....

FLOYD FARMER, Administrator of the Estate of Donald Lewis Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

WILLIE FARMER, Administrator of the Estate of Thomas Donald Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioners, Floyd Farmer, Adm'r, and Willie Farmer, Adm'r, ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

Sixth Circuit rendered in these two cases on February 28, 1959. Associate Justice Potter Stewart on May 26, 1959 extended the time for filing a petition for writ of certiorari to and including July 28, 1959. Since the two cases involve identical or closely related questions, a single petition is presented covering both cases.

OPINIONS BELOW.

These are actions brought by petitioners for the recovery of damages from Louisville & Nashville Railroad Company for the deaths of their sons in a railroad crossing accident. Jurisdiction of the district court arose from diversity of citizenship. There have been two trials of the cases.

At the first trial, the district court rendered judgments on jury verdicts in favor of petitioners for $30,000.00 in each case. On appeal by the railroad, the Court of Appeals reversed for error in instructions and granted new trials. On the second trial, there was a jury verdict for the railroad in both cases. The judge who presided at both trials died without having entered judgments on the verdicts. Another judge entered judgments and overruled petitioners' motions for a new trial in each case. Petitioners appealed from the judgments to the Court of Appeals.

The opinion of the Court of Appeals reversing the judgments in favor of petitioners upon the first trial is reported as **L. & N. Ry. Co. vs. Farmer, 220 F2d 90,** and **224 F2d 599** (opinion on rehearing).

Neither the district court nor the court of appeals delivered an opinion on the second trial.

JURISDICTION.

The grounds on which the jurisdiction of this Court are invoked are as follows:

(i) The date of the decision of the Court of Appeals, affirming the judgment of the district court on order, without opinion, is February 28, 1959.

(ii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Is it a part of the right of trial before a jury guaranteed by the Seventh Amendment in a case where there is serious conflict in the evidence on material issues to have the same judge who presided at the trial and, therefore, was the only judge having opportunity to observe the bearing and demeanor of the witnesses decide whether or not to enter judgments on the verdicts and pass on a motion for a new trial where the questions whether the verdict is against the overwhelming weight of the evidence and is based upon evidence which is false are raised?

2. Were the judgments on the jury verdicts and the denial of petitioners' motions for a new trial made by a judge who did not preside at the trials of these cases an unconstitutional abridgment of petitioners' right to trial by jury under the Seventh Amendment?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

United States Constitution—Amendment VII—Civil Trials:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Act of June 19, 1934, Chap. 651, by which Congress authorized the Supreme Court to prescribe rules for the district courts provides:

> ". . . Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant . . ."

Sec. 2 of the Act, authorizing the uniting of equity rules with those in actions at law so as to secure one form of civil action and procedure for both contains the following proviso:

> ". . . **Provided, however,** That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."

Rule 63 of the Rules of Civil Procedure is as follows:

> **"Disability of a Judge.**
>
> "If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the

court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

STATEMENT OF THE CASE.

Petitioners' complaints presented three theories of liability on the part of the railroad: (a) violation of a state statute known as the Tennessee Railway Precautions Act; (b) violation of a municipal speed ordinance limiting the speed of trains to 30 miles per hour; and (c) common law negligence in the operation of the train across the crossing, which was an extra-hazardous one in Springfield, Tennessee, where the railroad's tracks intersect Main Street, which was designated as both a state highway and a United States highway.

The railroad denied liability on all three theories and set up the affirmative defense of contributory negligence on the part of both the driver and the guest who were killed in the accident.

The Case Based on the Tennessee Railroad Precautions Act.

The Tennessee Railroad Precautions Act, Section 2628 (4) of the Code of Tennessee, provides:

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

The particular violations of the above statute alleged by the plaintiffs were:

(a) Failure to comply with the duty to keep a lookout ahead; and

(b) Failure of the engineer, when the automobile in which plaintiffs' intestates were riding appeared "upon the road", to put down the brakes and to employ any means to prevent the accident.

Certain facts were admitted by the engineer and the fireman on the locomotive in their testimony and were, therefore, undisputed, viz.:

(1) Although both the engineer and the fireman testified that they were looking straight ahead as the train approached the crossing, neither saw the Farmer automobile until **after** the collision had occurred;

(2) The engineer had not applied the brakes as the train approached the crossing, but did so **after the impact.**

The engineer died after the first trial and before the second trial. Discovery depositions of both the engineer and the fireman taken between the two trials were read by the plaintiffs on the second trial. As regards the above facts, the summary of their testimony at the first trial contained in the opinion of the Court of Appeals (220 F. 2d 93-94) is correct as to the evidence at the second trial.

The evidence at the second trial as regards the place where the Farmer car appeared around the corner of the obstructing building at the intersection was not materially different from the evidence at the first trial. It was substantially undisputed that after the car had passed the corner of the building and was on the nearmost (side-track in Court of Appeals' opinion) of the two railroad tracks running across Main Street, it stopped or checked its speed and came nearly to a stop at a point about eight

or ten feet from the path of the train (Testimony of Roy Ashbranner, Appendix to Main Brief of L. & N. Railroad Co., Appellee, page 14b; cf. L. & N. Railroad Co. v. Farmer, 220 F. 2d 93).

The evidence as to the speed of the train and the length of time the crossing signals had been in operation before the Farmer car appeared on the road ahead of the train was in serious conflict. And on the second trial there was the same conflict as on the first on the issue of whether or not the passenger or guest told the driver, when the car stopped or came nearly to a stop on the nearmost track to "go ahead." (See Summary by Court of Appeals of testimony of Ray Baker and Herschel Crawford on this point, L. & N. Ry. Co. v. Farmer, 220 F. 2d 95.)

On the second trial, the railroad called a new witness, Dewey Kelley, the Chief Dispatcher of the railroad's Evansville Division. This witness introduced in evidence a traingraph or record made by the automatic Central Train Control (CTC) System, and testified that it showed that for a distance of a half mile before the train entered the Main Street crossing, and at the time of the accident, the train speed was only 30 miles per hour. This evidence, which was not introduced by the railroad at the first trial, took the plaintiffs by surprise. Although the witness Kelley was subjected to cross-examination which greatly impaired the value of his testimony, it doubtless was accepted by the jury as corroborating the testimony of the engineer and the fireman that the train speed had been reduced from 65 miles per hour to 30 miles an hour as the train came into the corporate limits of Springfield and as conclusive on the issue as to the speed of the train.

The critical part of the traingraph, when it was presented in evidence, was obscured by a blot claimed by the railroad to have been made by the dispatcher on duty the night of the accident. This dispatcher was not called as a witness.

After the trial, plaintiffs caused a color slide to be made of this portion of the traingraph. Obtaining the necessary technical information for interpreting the traingraph, they then filed affidavits showing that the conclusion of the Chief Dispatcher that the graph showed that the train speed when it entered the crossing was only 30 miles an hour was unscientific and that the traingraph, with the part underneath the blot exposed and correctly interpreted, showed that the train speed was 60 to 65 miles an hour (Affidavit of Fyke Farmer filed April 20, 1956, Appendix to Main Brief of Appellants, page 135a; Excerpts from Plaintiffs' Interrogatories filed after the verdict on Jan. 25, 1956 and the answers of the defendant L. & N. R. Co. thereto, Appendix to Main Brief of Appellants, pp. 100a-103a; Affidavit of R. B. Overton, filed Nov. 19, 1956, Appendix to Main Brief of Appellants, page 115a; Affidavit of James A. Hamilton, Jr., filed Jan. 27, 1958, Appendix to Main Brief of Appellants, page 127a).

Conflict in Evidence as to Train Speed.

On the material issue as to the speed of the train, there was serious conflict in the evidence.

A Evidence relied upon by the plaintiffs that the train was travelling at a speed of 60 miles per hour.

Roy Ashbrenner, city policeman and an eyewitness, testified orally that he estimated the speed of the train at about 60 miles per hour (Appendix to Main Brief of Appellants, page 19a).

Plaintiffs showed by uncontradicted evidence that after the service application of the brakes was made by the engineer as soon as he looked out the side window of the locomotive and saw there had been a collision, the train travelled two city blocks, a distance of approximately a third of a mile before it came to a stop. The plaintiffs also introduced the expert testimony of Sidney S. Acker,

head of the Mechanical-Engineering Department of Vanderbilt University, that if the train were travelling at 30 miles an hour at the time of the accident, the service application of the brakes the engineer claimed that he made would have brought the train to a stop in 521 feet (Appendix to Main Brief of Appellants, Stanfield, pages 51a-52a, Gloster, page 63a, Statement of Roy R. Ashbranner, page 40a, Acker, page 59a).

Stanfield, the engineer, testified:

"Q. And you didn't see the car afterwards?

A. No, I didn't hang out my head and look to see [what] it was. I didn't know what it was, it might have been an oil truck for all I know."

Appendix to Main Brief of Appellant, pp. 58a-59a.

The photographs of the demolished automobile taken immediately after the accident which the plaintiffs introduced in evidence showed it resting on a battery box 50 feet from the point of impact.

It was undisputed that the automobile was tossed up in the air high enough for the three occupants on the front seat to have fallen out of the car on the side of the driver and for their bodies to have been found alongside the rails beyond the place where the car came to rest on top of the battery box.

B. **Evidence relied upon by the defendant railroad that the train speed was not in excess of 30 miles per hour.**

The testimony of the engineer and fireman summarized by Court of Appeals in **L. & N. R. Co. v. Farmer, 220 F. 2d 93-94.**

The testimony of Dewey Kelley, the Chief Dispatcher, excerpts from which are printed in Appendix to Main Brief of Appellants at pages 64a-78a and in Appendix to Main Brief of Appellee at pages 44b-51b.

Evidence Tending to Show That Engineer and Fireman Were Not Keeping Attentive Lookout Ahead.

The Court of Appeals in **L. & N. R. Co. v. Farmer, 220 F. 2d 94,** expressed the conclusion that the fact that the engineer did not see the Poole automobile pass over the tracks ahead of the Farmer car was "an indication that he was not very keenly on the lookout," and with respect to the testimony of the fireman said: "Apparently he was not very attentive as a lookout."

In the deposition of the engineer, taken between the two trials, the engineer admitted that he knew that the Main Street crossing in Springfield was a busy crossing, with a lot of automobiles, heavy traffic, going back and forth at the time of night the Georgian train passed there, and that Saturday (on which the accident happened) was a "busy night" (Appendix to Main Brief of Appellants, pages 52a-53a).

Proceedings in District Court After Verdict and Prior to Entry of Judgment.

The jury's verdicts on the second trial were filed on December 13, 1955. Judgments on the verdicts were entered on December 17, 1957. Immediately after the trial counsel for the railroad prepared judgments but agreed that for a limited period of time the judgments could be withheld from entry pending an investigation plaintiffs' counsel was making concerning the traingraph the railroad had introduced in evidence. The facts regarding this investigation are stated in an affidavit made by plaintiffs' counsel, which was filed April 20, 1956 (Appendix to Main Brief of Appellants, pages 135a-145a).

On February 14, 1956, plaintiffs filed a motion that judgment be withheld pending a discovery by plaintiffs and moved for leave to take the depositions of the superin-

tendent of the railroad's Evansville Division and the dispatcher on duty the night of the accident. On April 20, 1956, plaintiffs filed an amended motion asking leave also to examine the L. & N. Trainmaster, who obtained statements from the engineer and fireman on the Georgian train after the accident (Appendix to Main Brief of Appellants, pages 104a and 107a).

On April 18, 1956, there was a hearing on plaintiffs' motions before Judge Davies, who has presided at both trials on plaintiffs' motions. Judge Davies took them under advisement. Thereafter affidavits were filed by both parties (Docket entries in Appendix to Main Brief of Appellants, pages 2a-3a). On May 17, 1956, plaintiffs filed a motion for a hearing on the question of the entering of the judgments on the jury verdicts and for an opportunity to examine witnesses, including the railroad's superintendent, in open court after plaintiffs had been given opportunity to examine the railroad's traingraphs for a period of 90 days before the accident and for 30 days after the accident.

Due to a protracted illness, Judge Davies was never able to hold another hearing or rule on plaintiffs' motions. His death occurred on January 7, 1957.

On November 19, 1957, the plaintiffs filed a motion that the district court set aside the verdicts of the jury and grant a discretionary new trial under the authority conferred by Rule 63 of the Federal Rules of Civil Procedure upon the ground that questions of credibility of witnesses who testified in open court, **including Dewey Kelley**, would necessarily have to be passed on by the judge ruling on motions for a new trial and such questions could properly be decided only by a judge who had opportunity to observe the demeanor of the witnesses on the stand (Appendix to Main Brief of Appellant, pages 114a-115). Specifically, the plaintiffs in this motion averred:

"1. The verdicts were based upon the false conclusions from the traingraph presented by the testimony of Dewey Kelley, Chief Dispatcher of the Evansville Division of the L & N Railroad Company, that the Georgian train travelled from south switch to north switch, a distance of 2552 feet, in a minute, or at a speed of only 30 miles per hour, whereas the traingraph shows the train passed through the north switch OS Section less than 50 feet from the place of the accident at an average speed of not less than 58.8 miles per hour.

"Plaintiffs attach hereto the affidavit of R. B. Overton supporting the above ground of their motion. They offer to exhibit the color slide and testimony in open court to further support said ground."

The affidavit of R. B. Overton, filed on Nov. 19, 1957, in support of the motion stated:

"That he worked for the L & N as train dispatcher from 1913 until 1957 when he retired. During the last 15 years he handled and directed the operation of the CTC machine at Athens, Alabama, on the Birmingham Division of the L & N Railroad.

"That he has examined the original traingraph of the Henderson Division of the L & N Railroad for August 24, 1952, filed as an exhibit in the above-styled cases. He has also examined the color slide of that portion of the traingraph representing the passing of Train No. 80 through south switch and north switch Springfield, Tenn., under enlargement shown him by Fyke Farmer, attorney for the plaintiffs. The marks made by the automatic pen for the O. S. Section at north switch in green ink appear clearly enough under the blue ink of the dispatcher's pen to enable a fairly accurate determination to be made of the length of time train No. 80 occupied the north switch O. S. Sec-

tion. It appears to affiant the time of such occupancy was not longer than 15 seconds from which it follows that the average speed of the train through said O. S. Section was not less than 58.8 miles per hour."

Appendix to Main Brief of Appellants, pages 115a-116a.

The Judgment and Rulings of the Successor Judge.

On December 17, 1957, the other regular judge of the district court entered judgments on the jury verdicts, but by the order expressly reserved decision on plaintiffs' application for a new trial pursuant to Rule 63 of the Federal Rules of Civil Procedure and the other motions filed by the plaintiffs subsequent to the verdict of the jury (Appendix to Main Brief of Appellants, pages 116a-117a).

Motions for new trials under Rule 59 of the Federal Rules of Civil Procedure were duly filed by the plaintiffs raising the questions that the verdicts were against the overwhelming weight of the credible evidence and were contrary to the law and the evidence. The motions also sought a new trial on the basis of the newly discovered evidence concerning the traingraph with supporting affidavits (Appendix to Main Brief of Appellants, pages 118a-129a). In their motions for a new trial, plaintiffs offered the color slides which they had procured after the trial in evidence and moved for a hearing in court at which they would have opportunity to exhibit them on a screen (Appendix to Main Brief of Appellants, pages 124a-125a).

The defendant railroad furnished the court reporter's transcript of the trial proceedings. The same judge who had entered judgments on the verdicts without prejudice to plaintiffs' motions for new trials under Rule 63 on April 24, 1958, holding that he could properly perform the duty of passing on all pending motions, denied them without

assigning any reasons other than, "the Court is of the opinion that said motions are not well taken and they are accordingly hereby denied" (Appendix to Main Brief of Appellants, page 130a).

Judgment of Court of Appeals.

The cases were argued in the Court of Appeals on February 21, 1959. On February 28, 1959, the Court announced its decision, affirming the judgment of the district court on order, without opinion. The order stated;

> "And it appearing that there was substantial evidence to support the jury verdicts in favor of the defendant and that no reversible error inheres in the conduct of the trial by the district judge, or in his charge to the jury; and it appearing further that there is no valid ground for the granting of a new trial on the basis of newly discovered evidence;
>
> "The judgment of the district court in each case is affirmed."

ARGUMENT.

Take away the railroad's evidence given by its employees, the engineer, the fireman and the chief dispatcher, that the train was not exceeding 30 miles an hour when it struck the automobile on the crossing and there would be no evidence to support the verdicts. Take away the evidence given by the chief dispatcher based on the train-graph introduced at the second trial upon a weighing of the testimony given by the engineer and the fireman by a judge who observed their demeanor on the stand in "the spirit of honest desire" for the truth and to see that only justice was done, and the verdicts would be equally insupportable. Upon the weighing of the testimony of the engineer and fireman by the same judge who heard them testify at the first trial, especially in light of the showing made by plaintiffs by the post-trial affidavits that the conclusions of the chief dispatcher were unscientific and false, the trial judge would have been bound in good conscience to hold that to enter judgments on the verdicts would be a gross miscarriage of justice. Here is the reason why.

The Controlling Rules of Law.

(a) Proof by the plaintiffs that the automobile became an obstruction on the track and that there was a collision shifted the burden on the railroad to prove that all the statutory precautions were complied with and that the accident was unavoidable.

(b) As interpreted by the Supreme Court of Tennessee, the statute requires the utmost vigilance, the greatest possible care and diligence, and the use of every possible means on the part of railroad companies and their agents, to prevent injuries to persons and property.

(c) The impossibility to check the train before colliding with the obstruction does not excuse nonobservance

of the statutory precautions in other respects, where such observance is possible.

(d) To place liability upon the railroad company, it was not necessary to show that the violation of the statute was the proximate cause of the accident, but only that the statute had been violated.

(e) The grossest negligence, directly and proximately contributing to the accident, will not defeat an action based on the statute, but will go only in mitigation of damages, where the railroad fails to comply with the required precautions, whether its failure to comply with the statute is the cause of action or not.

(f) Although, where the appearance of the obstruction on the track is so nearly simultaneous with the collision there is no opportunity for observance of the duty of putting down the brakes or taking other means to prevent an accident before the collision, the duty of the enginemen respecting the automobile is to be tested by common law principles, if the train approached a much used crossing whereon the presence of persons or automobiles might reasonably be anticipated, at a rate of speed which the engineer knew, or should have known, would render it impossible to comply with the requirements of the statute if an obstruction appeared on the crossing, the non-observance of the statutory precautions would not be excused and the railroad would be liable.

The Law of the Case As Declared by the Court of Appeals.

A. **As respects the Lookout duty.**

". . . .The jury properly was told that the statute contemplates an efficient and watchful, and not merely a perfunctory lookout; that a lookout failing to see what due care would have revealed would not properly be discharging his duty; and that an obstruction

might appear on the road which, under the statute, would require the train crew to put down the brakes and employ every possible means to stop the train and prevent an accident, even though the obstruction was not seen, but should have been seen by an observant lookout.

"The judge charged specifically: 'It was shown in evidence that the Farmer automobile was following immediately behind an automobile driven by Odell Poole, going in the same direction on Main Street; that the Poole automobile crossed the railroad tracks in front of the approaching Georgian train after the warning signal at the crossing had been set in operation, and at a moment when the train was very close upon him; that the Farmer automobile behind Poole reached the side track and came to a stop, or practically to a stop, before proceeding towards the main track. While both the engineer and the fireman on the train testified that they were on the lookout ahead when the train approached the Main Street crossing, neither of them, according to their testimony, saw the Poole automobile and did not see the Farmer automobile until the collision occurred. If you find that an observant lookout should have disclosed to the engineer or the fireman the appearance of the Poole automobile upon the road, you would be authorized to infer from the failure of the engineer and fireman to see it that the lookout was negligent and heedless, and therefore there was a failure on the part of the railroad to comply with the requirements of the statute that it shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead.'"

L. & N. R. Co. v. Farmer, 220 F. 2d 97-98.

B. **As respects the speed of the train and the defense of impossibility of compliance with the statute and unavoidableness of the accident.**

"The jurors were further instructed that, although the burden of the statute would be lifted when the railroad company shows that it did all that the Railroad Precautions Statute required it to do and that the accident was unavoidable, liability would still exist if the negligent conduct of the railroad engineer deprived the carrier of the power to comply with the requirements of the statute.

"The judge pointed out that in such circumstances the carrier could not rely upon the impossibility of observance of the statutory precautions. He instructed the jury that the time available to the engineer in which to observe the statutory requirements would depend to a great extent upon the speed at which the train was moving. The jury was charged specifically: 'If you find that the defendant's Georgian Train approached the Main Street crossing in Springfield and that it was a much used crossing whereon the presence of persons or automobiles might reasonably be anticipated, at a rate of speed which the engineer knew, or should have known, would render it impossible to comply with the requirements of the statute if an obstruction appeared on the crossing the nonobservance of the statutory precautions would not be excused.

" **'The plaintiffs contend that the Georgian Train was moving at a speed of fifty to sixty miles an hour across Main Street in the City of Springfield and collided with the Farmer automobile, and there is evidence to support this contention. If you believe this evidence, and find that this speed made it impossible for the engineer to put down the brakes, or take any other possible means to stop the train before the col-**

lision, then the defendant would be liable under the Railroad Precautions Statute.' " (Emphasis supplied.)

How Petitioners Were Prejudiced by Judgments Entered by Judge Who Did Not Preside at Trial.

The above-quoted portions of the charge to the jury upon the first trial, having been specifically approved by the Court of Appeals, was the law of the case. It is on the basis of the law of the case—and particularly as declared in the italicized paragraph—that petitioners assert that without the evidence introduced by the railroad to show that the train was going, not 60 miles an hour as plaintiffs contended but only 30 miles an hour, there would be no evidence to support the verdicts. Upon undisputed evidence that the train speed was 60 miles per hour, according to the law of the case, there would be liability on the part of the railroad. The only question for the jury to decide would be damages. If the railroad's evidence creating a conflict on the issue of the speed of the train was believed by the judge who presided at the trial to be not credible it would have been his duty to set aside the verdicts and grant a new trial.

Only the judge who presided at the trial was competent to weigh the testimony of the engineer, the fireman and the chief dispatcher who gave this evidence for the railroad, for only he had observed their demeanor on the stand and had opportunity to take demeanor into account. Judge Davies had opportunity to observe the demeanor of the engineer and fireman on the stand at the first trial. The jury on this trial evidently did not believe their testimony that the train speed had been reduced from 65 miles an hour to 30 miles an hour as the train came into the corporate limits of the City of Springfield and was not in excess of 30 miles an hour at the crossing. As hereinabove stated the engineer died before the second trial. The railroad

did not put the fireman on the stand at the second trial. It called only the chief dispatcher with the traingraph. Judge Davies observed the demeanor of this witness for the railroad, Dewey Kelley.

At the second trial the plaintiffs read the discovery depositions of the engineer and the fireman and thereby proved the necessary evidentiary basis for the expert conclusions of the head of the Mechanical Engineering Department of Vanderbilt University which rebutted the statements of the two trainmen that the train speed was not more than 30 miles an hour. [This they had a right to do under the last sentence of Rule 26 (f) of the Federal Rules of Civil Procedure.] The railroad, of course, has its own experts who were qualified to show braking—stopping distances. None of these were called to contradict the expert opinions and conclusions of Mr. Acker, plaintiffs' witness.

In the extremity at which the railroad found itself when plaintiffs closed their case, it adopted the tactic of putting in the traingraph (which it had not seen fit to introduce on the first trial) and to call, not the dispatcher who was on duty the night of the accident and who had blotted out the significant part of the graph but, another dispatcher who gave the technically wrong, unscientific and false conclusions for the purpose of corroborating the evidence of the engineer and the fireman. Only Judge Davies, who observed the demeanor of this witness on the stand, possessed the qualifications for weighing his testimony. Judge Davies did not enter judgments on the verdicts. The judgments were entered by another judge, who presided at neither of the two trials. For this judge to hold that he was competent to perform the duties resting upon the court at the stage of the case at which he began to sit was an abuse of the discretion conferred by Rule 63 and a plain error of law.

The plaintiffs have been deprived of their right to have the judge who presided at the trial of the cases decide whether or not the verdicts were so palpably against the weight of the evidence, were contrary to the law and the evidence and were based upon false evidence, that judgments should not be entered on the verdicts or new trials granted.

The Court of Appeals' Misconception of the Duty of the Trial Judge as Regards Weighing the Evidence in Deciding Whether Verdict Should Be Set Aside.

The Court of Appeals, holding as it did that the district court did not err in denying a new trial because there was substantial evidence to support the verdicts, confused the functions of the court in passing on a motion for a new trial with those involved in passing on a motion for a directed verdict. In disposing of the constitutional question raised by petitioners in the way it did, the Court of Appeals departed from the rule established by the Sixth Circuit Court of Appeals more than a half century ago, and which, so far as the reported decisions disclose, has been followed ever since that time by that court of appeals and all the other courts of appeals that have had occasion to decide the question.

The Sixth Circuit Court of Appeals in an opinion by Judge Lurton in **Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463**, and in another opinion by Judge Taft in **Felton v. Spiro, 78 Fed. 576**, held that the function of a court in passing on a motion for a directed verdict is different from the function of weighing the evidence on motion for a new trial. In passing on a motion for a directed verdict, the court cannot properly undertake to weigh the evidence. "His duty," the Court said, "is to take that view of the evidence most favorable to the party

against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus." But, in passing on a motion for a new trial, the court is required to make a comparison of opposing proofs and decide whether injustice has been done by the verdict of the jury. As Judge Taft said, **"It is one of the most important rights which a party to a trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to take the case before another jury."** (Emphasis supplied.)

This rule was followed in **General American Life Ins. Co. v. Central Nat. Bank of Cleveland (C. A. 6th), 136 F. 2d 821,** which was the second appearance of that case in the Court of Appeals. The district judge on a former trial directed a verdict for the defendant insurance company. The Court of Appeals reversed holding that certain questions of fact should have been submitted to the jury. On retrial—the evidence being in the main similar to that adduced at the former trial—the district judge overruled a motion for a directed verdict. The jury found for the plaintiff against the insurance company. Judgment was entered on the verdict. In overruling a motion for a new trial, the district judge declared that to enter a judgment for the defendant insurance company in spite of the verdict for the plaintiff, **or to order a new trial** would not be consistent with the opinion of the Court of Appeals. The Court of Appeals on the second appeal remanded the case, with directions to the court below "to consider and act in its own discretion upon appellant's motion for a new trial, stating the reasons for his action." The Court of Appeals for the Sixth Circuit in its opinion in this case further said:

". . . In Felton v. Spiro, 6 Cir., 78 F. 576, 582, we said: 'It is apparent from the foregoing, that the

view of the learned judge at the circuit, expressed in the opinion on the motion for a new trial, that because the court cannot direct a verdict one way, it may not set aside a verdict the other way, as against the weight of the evidence, is erroneous. Indeed, as distinctly pointed out by Judge Lurton, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of the evidence. In the former there is no weighing of plaintiff's evidence with defendant's. It is only an examination into the sufficiency of plaintiff's evidence to support a burden, ignoring defendant's evidence. In the latter, it is always comparison of opposing proofs.'

"Appellant was entitled to have the court pass upon the motion for a new trial in the exercise of its own independent judgment. This it has not had. **It is entitled to have the court below weigh all the evidence, and exercise its discretion to say whether or not, in its opinion, the verdict was so opposed to the weight of the evidence that a new trial should be granted, . . .'** Felton v. Spiro, supra, 78 F. page 583. (Emphasis supplied.)

Decisions of Other Courts of Appeals.

Decisions of other courts of appeals holding that a failure by the trial judge to exercise discretion whether to set aside a jury verdict upon the ground that it is against the weight of the evidence, or because he does not think that it is right, or an abuse of it is an error of law that may be corrected on appeal are:

Third Circuit.

Magee v. General Motors Corp., 213 F. 2d 899.

Fourth Circuit.

Garrison v. United States, 62 F. 2d 41;
Roedigar v. Phillips, 85 F. 2d 995;
Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350;
Snead v. New York Central Ry. Co., 216 F. 2d 169;
McCracken v. Richmond, Fredericksburg & Potomac Ry. Co., 240 F. 2d 484.

Fifth Circuit.

Marsh v. Illinois Central R. Co., 175 F. 2d 498.

Ninth Circuit.

Sou. Pac. Ry. Co. v. Guthrie, 186 F. 2d 926.

District of Columbia.

Eastern Airlines, Inc., v. Union Trust Co., 230 F. 2d 25, 99 U. S. App. D. C. 205. certiorari denied, 77 S. Ct. 816, 353 U. S. 942, 1 L. Ed. 760.

In **Marsh v. Illinois Central R. Co.**, supra, the Court of Appeals for the Fifth Circuit declared that the common law power of the trial judge to grant a new trial "in his discretion, irrespective of error and merely because he does not think the verdict right, is fully preserved" by the Seventh Amendment, citing **Parsons v. Bedford, Breedlove & Robeson, 3 Pet. 433, 7 L. ed. 732**, and saying further:

> "This matter was fully dealt with in the Sixth Circuit by successive opinions by Judges Lurton, Taft and Harlan, in Mt. Adams & E. P. Inclined R. Co. v. Lowery, 74 F. 463; Felton v. Spiro, 78 F. 576; and Travelers Ins. Co. v. Randolph, 78 F. 754. The same distinctions were maintained by this court in Howard v. Louisiana & A. R. Co., 5th Cir., 49 F. 2d 571. A motion for a directed verdict, or for a judgment notwithstanding the verdict under Rule of Civil Procedure 50, 28 U. S. C. A., raises a question of law only:

Whether there is any evidence which, if believed, would authorize a verdict against movant. The trial judge in considering these motions does not exercise discretion, but makes a ruling of law only, and if he errs the appellate court may reverse. A motion for a new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed error; and he may grant one (and he alone can) because he thinks the verdict wrong, though supported by some evidence. The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected. The motion for a new trial is entirely independent of the other two motions and is governed by different principles, and has a different result. It never supersedes the jury, but as its name states, it results in another jury trial, perhaps with different evidence produced." . . .

"While it is not our function to weigh the evidence, we do agree with the trial judge's first expressed opinion that the weight of the evidence is 'overwhelmingly against the plaintiff.' . . . There was evidence of the appellant, not very explicit or positive, which if believed might authorize a jury to conclude he was hurt in the manner he claims. Because the trial judge does not believe it, because of appellant's own contradictions and conduct and of opposing evidence which seem to overwhelm it, is not ground for a judgment notwithstanding the verdict, and we must reverse that judgment. Howard v. Louisiana & A. R. Co., 5 Cir., 49 F. 2d 571.

"3. But it is ground for the trial judge to grant a new trial, though the trial was free of other error. The full discretion vested in the trial judge not having been exercised, we will remand the case with direction to the judge to grant a new trial instead of a judg-

ment notwithstanding the verdict if he continues to think the verdict to be against the overwhelming weight of the evidence."

Applicable Decisions of This Court.

In **Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U. S. . . ., 2 L. ed. 2d 953, 964, 78 S. Ct. . . .**, in an opinion delivered by Mr. Justice Brennan, the Court said:

". . . . The trial judge in the federal system has powers denied the judges of many states to comment on the weight of the evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence."

In **Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212, 67 S. Ct. 752, 91 L. ed. 849,** the Court declared:

". . . Determination of whether a new trial should be granted or judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case that no appellate printed transcript can impart. See March v. Philadelphia & W. C. Traction Co., 285 Pa. 413, 418, 132 A. 255; Bunn v. Purstein, 153 Pa. Super. Ct. 637, 638, 34 A. 2d 924. See also Yutterman v. Sternberg (C. C. A. 8th), 86 Fed. 321, 324, 111 A. L. R. 736, 32 Bankr. Rep. (N. S.) 392. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone."

In **Walker v. New Mexico and Southern Pacific Railroad Company, 165 U. S. 593, 17 S. Ct. 421, 41 L. ed. 837,** the Court said:

"The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine questions of fact, and no one to-day doubts that such is the legitimate duty and function of the court, notwithstanding the terms of the constitutional guarantee of right of trial by jury."

The Seventh Amendment was construed in **Capital Traction Co. v. Hof, 174 U. S. 1, 18 S. Ct. 580, 43 L. ed. 873,** as meaning a trial before a jury of twelve men in the presence and under the superintendence of a judge empowered, not only to instruct them on the law and to advise them on the facts but also (except on acquittal of a criminal charge), to set aside their verdict if in his opinion it is against the law or the evidence. It was held that trial before a justice of the peace and a jury was not a trial within the meaning of the amendment, one of the reasons being that the Act of 1823 permitting cases to be tried before a justice of the peace and a jury in the District of Columbia, did not authorize the justice of the peace to set the verdict of the jury aside for any cause, but made it his duty to enter judgment upon it forthwith, **as a thing of course.**

In the opinion in the foregoing case, the Court quoted with approval the following statement from Hale's History of the Common Law, chap. 12: "Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it." Further in the opinion, there was quoted an opinion by Judge Sprague, delivered in the district court of the United States for the district of Massachusetts stating:

". . . 'At the time of the adoption of the Constitution, it was a part of the system of trial by jury in

civil cases that the court might, in its discretion, set aside a verdict.' 'Each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards as understood when the Constitution was adopted.' United States v. 1363 Bags of Merchandise (1863), 2 Sprague 85-88."

Rule 63 and the Seventh Amendment.

Rightly construed Rule 63 of the Federal Rules of Civil Procedure is not in conflict with the Seventh Amendment. The discretion conferred upon a successor judge to decide whether he can perform the duties of the court after verdict is a judicial discretion. When the term "discretion" is invoked as a guide to judicial action, this Court has said, "it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." **Langnes v. Green, 282 U. S. 531, 541, 51 S. Ct. 243, 75 L. ed. 520.**

Rule 63 was written with the idea that no hard and fast rule could be made concerning the power of a successor judge to perform the duties of the court after verdict. There are case where the fact that the successor judge did not preside at the trial works no disqualification. Such a case is **Meldrum v. U. S., 146 Fed. 390, affirmed in 151 Fed. 177.** From the opinion of the district court it appears that the defendant's motion for a new trial at first assigned grounds requiring the weighing of the evidence by the judge who presided at the trial of the case. On presentation of the motion, however, the defendant through his counsel explicity waived all of those grounds and insisted only that the successor judge had no power to perform the functions of the judge who had died after the rendition of the verdict and while the motion for a new trial was

pending. Making his decision on the faked question of power, the successor judge held that he could act.

Rule 63 obviously contemplates that there may be cases where a judge who did not preside at the trial cannot properly perform the duty of weighing the evidence and passing on the motion for a new trial. Congress in the act conferring authority upon the Court to prescribe rules of civil procedure for the district courts took the precaution to provide:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."
>
> **28 U. S. C. A., Sec. 2072.**

The right of trial by jury "as at common law" included the right of the party against whom the jury verdict was returned to have the judge who presided at the trial weigh the evidence and decide whether he was satisfied with the verdict. This was a substantive right as valuable and important as the right to have the judge present when the evidence was introduced and to instruct the jury on the law. Trial by jury "as at common law" was not completed until this duty resting on the trial judge was performed. It could be performed only by the judge who presided at the trial.

In Barron and Holtzoff's Federal Practice and Procedure (Rules Edition), Vol. 3, Sec. 1302.1, it is stated:

> ". . . Everyone concedes that the weight of the evidence could not be raised by writ of error and thus was not subject to appellate review at the time the Seventh Amendment was adopted. But it was the practice at common law prior to that date for the trial to be conducted by a single judge at nisi prius,

and for motions for a new trial to be heard by the court sitting en banc at Westminster. It is argued that this review by the court en banc is more like present American appellate practice than it is like our motions for a new trial, addressed to the single judge who presided at the trial. Thus, it is contended that the Seventh Amendment does not prevent modern appellate courts from exercising those powers which might have been exercised by the full court sitting at Westminster in 18th century England.

"This argument oversimplifies the historical date. An exhaustive examination of the early English cases has led one writer to conclude there is not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court or certified, that the verdict was against the evidence and that he was dissatisfied with the verdict. Assuming the accuracy of the historical conclusion, the common law system was one in which the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict unjustified, and even then, only if he could persuade his brethren at Westminster to this view. Thus we have already liberalized the granting of new trials beyond that known at common law, since under the present American system, the trial judge can set aside the verdict on this ground without getting the approval of any other judge. . .

"By way of summary, the discretion of the trial court in passing on a motion for a new trial where it is claimed the verdict is against the weight of the evidence is not subject to review. A strong and consistent line of authorities is to this effect . . ."

The late Judge Jerome Frank of the Court of Appeals for the Second Circuit, concurring in **Dyer v. MacDougal**

et al., 201 F. 2d 265, 272, showed that the reason the orders of the trial judge granting or denying a new trial are seldom reviewable is because of his peculiar opportunity to evaluate evidence by taking the demeanor of the witnesses into consideration, saying:

> "On a motion for a new trial, the judge acts 'as the thirteenth juror', i. e., he evaluates the credibility of the orally-testifying witnesses and therefore their demeanor. But on a motion for a directed verdict he does not. The rule that a trial judge may legitimately consider demeanor in ordering new trials means that his new-trial orders are seldom reviewable; on the other hand, the rule that may not legitimately consider demeanor in considering directed verdict motions means that his orders on such motions are readily reviewable. See Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 254, 61 S. Ct. 189, 85 L. ed. 147."

Consistently with this view, this Court in **U. S. v. Johnson, 327 U. S. 106, 66 S. Ct. 464, 90 L. ed. 562, rehearing denied 327 U. S. 817, 66 S. Ct. 699, 90 L. ed 1040**, said:

> "It is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact."

In Moore's Fed. Prac., Vol. 7, par. 63.05, the view is stated that in the absence of consent of all parties, Rule 63 does not authorize a judge to enter a judgment on the basis of a transcript of the trial before another judge who dies or becomes disabled. The Court of Appeals for the Sixth Circuit in **United States v. Nugent, 100 F. 2d 215**, certiorari denied sub nom. **Fidelity & Columbia Trust Co. v. U. S., 306 U. S. 648, 59 S. Ct. 591, 83 L. ed. 1046**, a case tried without a jury, declared:

"The trial judge has the right and duty to observe the bearing and demeanor of the witnesses, and where the evidence is conflicting he may take those things into account. Such personal observations cannot be transferred to the printed page, and yet the judge may, and often must, give them weight in making his decision. In the present instance it is difficult to see how the judge who entered the findings had any proper opportunity to decide any question affected by the credibility of the witnesses. While the statute does not in terms require that the same judge shall hear the evidence and make the findings, since by universal practice and tradition these findings are based upon personal observation of the witnesses, and are conclusive upon the reviewing court, the statute impliedly requires that the same judge who hears the case shall make the findings and conclusions, and this requirement is mandatory."

The Court of Appeals for the Ninth Circuit in **Southern Pacific Co. v. Guthrie**, supra, said that the power to set aside a verdict as being against the clear weight of the evidence "belongs exclusively to the trial judge." The Court of Appeals for the Fifth Circuit in **Marsh v. Illinois Central R. Co.**, supra, said that the trial judge may grant a new trial "(and he alone can) because he thinks the verdict wrong, though supported by some evidence." Judge Taft, speaking for the Sixth Circuit Court of Appeals in **Felton v. Spiro**, supra, said that the action of the trial judge on such motion "is not the subject of review." And the Court of Appeals for the Fourth Circuit in **Snead v. New York Central R. Co.**, supra, said that the appellate court is "without power" to order a new trial upon this ground.

For the reasons clearly shown, petitioners say that the judgment of the successor judge that he could properly

perform the duties of the court in these cases after verdicts rendered notwithstanding he did not preside at the trial was contrary to the law and was not within his sound or judicial discretion; that not having heard the witnesses testify he was no better qualified than the Court of Appeals or this Court to weigh the evidence and decide whether the verdict should be set aside as being against the clear weight of the evidence; that the only judge who could perform this duty was Judge Davies, who died before passing on the motions filed by petitioners, raising the questions and without entering judgments on the verdicts; and that by construing Rule 63 as conferring upon him the power to enter the judgments and pass on the motions for a new trial over the objections of petitioners, the successor judge abridged or denied a substantive right of petitioners and failed to preserve the right of trial by jury as at common law and as declared by the Seventh Amendment.

REASONS RELIED ON FOR GRANTING THE WRIT.

Petitioners say that the Court of Appeals by its affirmance of the judgment of the District Court rendered a decision that is in conflict with:

(a) Applicable decisions of this Court;

(b) The decisions of other courts of appeals and its own prior decisions in the same matters;

(c) That it has decided an important question arising under the Rules of Civil Procedure adopted by this Court to govern the practice in the district courts which has not been, but should be, settled by this Court; and

(d) That it has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

PRAYER.

Wherefore, your petitioners pray that a writ of certiorari issue from this Honorable Court; and that the judgment of the Court of Appeals be reversed by this Court and the District Court be ordered and directed to grant new trials in both of these cases, and for such further relief as petitioners may be entitled to.

This July 24, 1959.

.....

FYKE FARMER,
1111 American Trust Building,
Nashville 3, Tennessee,
Attorney for Petitioners.

FILE COPY

SUPREME COURT, U.S.
FILED
AUG 8 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 248.

FLOYD FARMER, Administrator of the Estate of Donald Lewis Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

WILLIE FARMER, Administrator of the Estate of Thomas Donald Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

JOHN J. HOOKER,
1106 Nashville Trust Building,
Nashville, Tennessee,
Attorney for Respondent.

Of Counsel:

DAVID M. KEEBLE,
1106 Nashville Trust Building,
Nashville, Tennessee.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion below	2
Jurisdiction of this court	3
Statement of the case	3
Argument	5
Validity of Rule 63	6
The factual issue as to the speed of the defendant's train	8
The speed of the train is not the determinative issue in this case	11
Petitioners' entire position is prejudicated upon the erroneous position that a trial judge in the federal court acts as a "thirteenth juror", should make his own determination of the credibility of witnesses who appeared before the jury, and should grant a new trial if he, the trial judge, had he been sitting on the jury, would have reached a different verdict	14
Conclusion	15
Appendix A	17

Cases Cited.

City of Knoxville, Tennessee, v. Bailey, 222 F. 2d 520 (C. C. A. 6)	14
Crawford v. Nashville etc. Railway, 153 Tenn. 642	13
Gaines v. T. C. Railroad Company, 175 Tenn. 389, p. 393	12
Jones v. Louisville and Nashville Railroad Company, 192 Tenn. 570	12
L&N Railroad Company v. Farmer, 220 F. 2d 90	10

Mahoney v. New York Central Railroad (C. C. A. 2), 234 F. 2d 929 14
McCampbell v. Central of Georgia Railway Co., 194 Tenn. 594, at p. 599 13
Norfolk So. Ry. Co. v. Dan's Frozen Foods, 195 F. 2d 662 (C. C. A. ...) 14
Peterman v. Indiana Motorcycle Company, 216 F. 2d 289 (C. C. A. ...) 14
Wertman Bag Corp. v. Agnew, 202 F. 2d 119 14

Statutes Cited.

Title 28, U. S. C. A., Section 1254 (1) 3
28 U. S. C. 776, U. S. Rev. St., Section 953 6

Textbooks Cited.

Moore, Federal Practice, Second Edition, Volume 6, page 3818 15
Cyclopedia of Federal Procedure (Third Edition), Volume 10, p. 79 15

Rules Cited.

Rule 63 of the Rules of Civil Procedure 2, 5, 6, 8
Rule 25 of the Rules of Criminal Procedure 6, 8

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. .....

FLOYD FARMER, Administrator of the Estate of Donald Lewis Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

WILLIE FARMER, Administrator of the Estate of Thomas Donald Farmer, Deceased,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MAY IT PLEASE THE COURT:

Petitioners, Floyd Farmer, Administrator, and Willie Farmer, Administrator, seek the issuance of a writ of certiorari to review an order entered by the United States

Court of Appeals for the Sixth Circuit, which order sustained judgments of the United States District Court for the Middle District of Tennessee for the defendant, Louisville and Nashville Railroad Company, in each of the above two cases, entered on jury verdicts in two wrongful death actions all growing out of a crossing accident. In affirming the judgments of the lower court, the United States Court of Appeals for the Sixth Circuit affirmed the trial court's **exercise of discretion** in determining that he could properly pass upon the plaintiffs' motions for a new trial pursuant to Rule 63 of the Rules of Civil Procedure, even though he did not preside over the actual jury trials, but, the trial judge, who actually presided over the jury trials which resulted in favorable verdicts for the defendant Railroad Company, died subsequent to such trials and prior to the time the plaintiffs' motions for a new trial were filed. The Court of Appeals for the Sixth Circuit also affirmed the trial court's exercise of discretion in overruling the plaintiffs' motions for a new trial under Rule 59 which contained various grounds as set forth therein.

It is the action of the Court of Appeals for the Sixth Circuit, in affirming the said **exercise of discretion** by the trial court in refusing to grant the plaintiffs a new trial under said Rule 63, and affirming the trial court's **exercise of discretion** that he could perform the duties related to ruling on the plaintiffs' motion for a new trial, even though he did not preside at the trials, that is sought to be reviewed by the petition in this matter.

OPINION BELOW.

There was no written opinion in the Court of Appeals for the Sixth Circuit, but a copy of the Court of Appeals' order denying the appellants' appeal is attached hereto as Appendix A.

JURISDICTION OF THIS COURT.

Petitioner seeks to invoke the jurisdiction of this Court under Title 28, U. S. C. A., Section 1254 (1).

It is respectfully submitted that the question presented by the petitioners merely relates to a matter of the trial court's **exercise of discretion** in two damage suits by the trial court and the affirmance of that **exercise of discretion** by the Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE.

The two cases were brought by two administrators for the death of two teenage boys, cousins, both by the name of Farmer. The two boys were killed when an automobile in which they were riding and which was being driven by Thomas Donald Farmer, stopped or virtually stopped at a point of safety, about eight or ten feet from the path of the train, with the automatic crossing signal lights and bell warning of the approach of the train, and then suddenly made a "lunge" into the path of the train. At the point where the boys stopped, or virtually stopped, they could have seen the approaching train four hundred or five hundred feet down the track. The headlight on the engine was burning and the MARS, or revolving, light was on and revolving. The horn was blowing. In spite of these clear warnings of the approaching train, the car "jumped" into the path of the train. (Testimony of plaintiffs' witness **Ashbranner**, a Springfield policeman, Appellee's Appendix, pp. 12b, 13b, and 14b; testimony of plaintiffs' witness **Crawford**, who was an occupant of the ill-fated car, Appellee's Appendix, pp. 16b, 17b, 18b, 19b, and 20b.) Thomas Donald Farmer, the operator of the automobile was killed. His cousin, Donald Lewis Farmer, who was sitting on the front seat, was also killed. Clay Baker, another of the occupants who survived, testified

that when they stopped, or virtually stopped, at a point of safety, about three yards from the side track (the main track on which the accident occurred was the second track the boys would have reached, and when the crossing signals were in operation warning of the approach of trains, the Farmer boy who was a passenger, shouted "Go Ahead". The Farmer boy who was driving the car "mashed the gas down" and the car "jumped out" onto the tracks into a collision with the train. (Appellee's Appendix, pp. 53b, 54b, 55b, 56b, and 57b.)

The evidence was undisputed that when these boys came to a stop, or virtually to a stop, at a point of complete safety, the crossing signals were working, the lights flashing, and the gong ringing, and the approaching train, with its lights burning and its horn blowing, was clearly visible and audible to the operator of the car and the occupants of the car.

ARGUMENT.

The cases were tried before the Hon. Elmer Davies and, as stated hereinabove, verdicts for the defendant Railroad Company were brought in by the jury in both cases. Judgments on the verdicts were not entered promptly because of the request of plaintiffs' attorney that he be given more time in which to prepare his motions for a new trial as, by that procedure, the commencing of the ten day period of time would be delayed. This was a matter of accommodation to opposing counsel. As stated in opposing counsel's petition, Judge Davies died before plaintiffs' motions for a new trial were filed.

The sole question presented by this petition is the correctness of the action of the Hon. William E. Miller, who succeeded Hon. Elmer Davies as United States District Judge for the Middle District of Tennessee, in exercising his discretion as provided and set forth in Rule 63 of the Rules of Civil Procedure, and in determining, under this record which was transcribed and filed, that he could satisfactorily and fairly pass upon the questions raised by the plaintiffs' counsel in his motions for a new trial filed on behalf of the plaintiffs.

In the petition for a writ of certiorari, opposing counsel appears to take two positions which are, to some extent, in any event, somewhat inconsistent. These positions are:

(1) That the exercise of the power of a successor judge to pass on a losing parties' motion for a new trial, pursuant to Rule 63, in any jury case where there is a sharp conflict of evidence, is an unconstitutional infringement of a party's constitutional right to a trial by a jury; and,

(2) That "rightly construed" Rule 63 of the Federal Rules of Civil Procedure is not in conflict with the "Seventh Amendment", but the trial judge, in exercising

his discretion that he could rightfully perform the duties of the court in ruling on the plaintiffs' motion for a new trial, pursuant to Rule 63, abused his discretion, and acted arbitrarily.

The basic validity of Rule 63, which expressly empowers a successor judge to perform such duties as entering a judgment and passing on motions for a new trial, after the verdict is returned, has been so well established that, in the last analysis, we respectfully insist that this petition is simply an effort to get this Court to review that exercise of discretion by the trial court, which exercise of discretion was affirmed by the Circuit Court of Appeals for the Sixth Circuit.

Validity of Rule 63.

The Statutes formerly made provision for the hearing and determination of motions for a new trial by the successor of the trial judge. (28 U. S. C. 776, U. S. Rev. St., Section 953.) Rule 25 of the Rules of Criminal Procedure is the same as Rule 63 applicable to civil cases.

This same contention made by opposing counsel was made in the criminal cases involving the Messrs. Connelly and Caudle (249 F. 2d 576).:

> "It is urged that the successor judge was not qualified to pass upon the pending motions, particularly their motions for judgment of acquittal notwithstanding the verdict or in the alternative for a new trial, because not having presided at the trial of the case he did not have the 'feel of the case.' "

The Court of Appeals for the Eighth Circuit, after citing and referring to a large number of decisions which have consistently upheld the validity of U. S. Rev. St., Section 953, Rule 63 of the Civil Rules of Procedure, and Rule 25 of the Criminal Rules of Procedure, squarely rejected the same contention made by the opposing counsel in this case.

"The law governing the situation here presented was strictly complied with and we think that law provided due process within the requirements of the Fifth Amendment. Meldrum v. United States, 9 Cir., 151 F. 177; Chin Wah v. United States, 2 Cir., 13 F. 2d 530; King v. United States, 6 Cir., 25 F. 2d 242; Owens v. Hunter, 10 Cir., 169 F. 2d 971; McIntyre v. Modern Woodmen of America, 6 Cir., 200 F. 1; Pessagno v. Euclid Inv. Co., D. C. D. C. 35 F. Supp. 743; United States v. Green, D. C. S. D., Ill., 143 F. Supp. 442. In Meldrum v. United States, supra, the authority of a succeeding judge to pass upon a motion for a new trial in a federal criminal case tried before another judge who died while the motion was pending was expressly sustained. In the course of the opinion in that case it is said (151 F. 182):

"'Did the judge of the court below have authority to pass upon the motion for a new trial and impose the sentence? The plaintiff in error contends that he did not, that he had not participated in the trial, and that the right of the plaintiff in error to have the judge who presided at his trial take part with the jury at every step in the determination of his guilt or innocence was a fundamental right which could not be taken away by an act of Congress, . . .

. . . . . .

"and it (Sec. 955 of the Revised Stat.) further provides that if said judge is satisfied that, owing to the fact that he did not preside at the trial or for any other cause, he cannot fairly pass upon said motion and allow and sign said bill of exceptions, he may in his discretion grant a new trial. If the succeeding judge can, as undoubtedly he may under this statute, deny a motion for a new trial, there can be no question of his power to further proceed in the case and render judgment upon the verdict."

"We conclude that the contention that Judge Nordbye was disqualified to perform the duties to be performed by the presiding judge after verdict is without merit."

The Connelly and Caudle cases were taken to the Supreme Court on this very point, and certiorari was denied (356 U. S. 921; 2 Law. Ed. 2d 716).

Certainly a defendant in a criminal case would be entitled to more protection in this connection than a litigant in a civil case.

It is true that in the Connelly case, the Court of Appeals pointed out that, "There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions" presented, and then proceeded to point out wherein the Connelly and Caudle cases did not involve that type of record. This discussion, and the conclusions reached therein, were in connection with passing upon the trial judge's exercise of discretion in undertaking to pass upon the defendant's motion for a new trial pursuant to Rule 25, as the successor to the trial judge who had died subsequent to the jury trial itself.

In other words, the validity of Rules 25 and 63 was clearly upheld, and have been consistently upheld by many decisions. Therefore, the only question that can be raised in this connection, and the only questions that can properly be raised here, is whether or not the successor trial judge (Hon. William E. Miller) abused his discretion and acted arbitrarily in undertaking to pass upon the plaintiffs' motions for a new trial.

The Factual Issue as to the Speed of the Defendant's Train.

In attempting to demonstrate that Judge Miller, the successor trial judge, should not have passed upon the plaintiffs' motions for a new trial, opposing counsel predi-

cates his argument upon the theory that the single determinative issue in the jury trials, which resulted in favorable verdicts for the defendant Railroad Company, was the question of the speed of the defendant's train.

It is true that there was conflicting evidence as to the speed of defendant's train but, as will be pointed out more fully hereinbelow, that issue of fact was, by no means, the real determinative issue. Even if that factual issue had been the determinative issue in the jury trial, there is no possible basis for the contention that a finding by the jury that the train was not running at an excessive rate of speed was against the palpable and manifest weight of the evidence, or that it was based on any false testimony. As is pointed out on pages 8 and 9 of opposing counsel's petition, the engineer and fireman who were operating the defendant's train, who had had many years experience operating railroad trains, and who had a speedometer before them, testified that they had reduced the speed of the train to 30 miles per hour upon entering the corporate limits of the City of Springfield. The defendant also introduced testimony that the movement of all trains on this particular line was recorded at the Dispatcher's Office at Evansville, Indiana, by an electronic Central Traffic Control System, and that from the traingraph thus produced it was his best **estimate** that the train traveled a distance of approximately a half a mile just before reaching the crossing in the elapsed time of approximately one minute. On cross-examination, the plaintiffs' attorney brought out from this witness that his testimony to that effect was only an estimate and that it could vary, for even the distance of half a mile a few seconds one way or the other. Estimates for distances substantially shorter than half a mile would, obviously, be impractical, with little or no probative value. (Appellant's Appendix, p. 64a, et seq.; Appellee's Appendix, pp. 50b and 51b.)

Now the only evidence introduced on behalf of the plaintiffs that the train was running at an excessive speed was

the estimate made by one Roy Ashbranner, a City policeman, of Springfield, who had never had any railroad experience, and who was simply making an estimate of the speed of the train by watching its approaching headlight coming directly towards him. (Appendix to Main Brief of Appellants, p. 19a.) It is true that plaintiffs also introduced a professor of the Engineering Department of Vanderbilt University, who had never operated a train of the type involved, and who attempted to work out a formula by which he purportedly demonstrated that the length of time it took the train to come to a stop under a "service application", indicated that the train was running at a higher rate of speed than testified by the crew. The testimony of the alleged expert was severely criticized by the Court of Appeals for the Sixth Circuit on the first appeal, when the plaintiffs' verdicts in these two cases were reversed. (**L&N Railroad Company v. Farmer**, 220 F. 2d 90.) In fact, the admission of the testimony of this alleged expert on air brakes was one of the grounds on which the Court of Appeals reversed the jury verdicts for the plaintiffs on the first trial. We submit that there was no substantial difference in the manner in which this same testimony was submitted on the second trial, and that the trial court's admission thereof, in the second trial, was prejudicial, and if the plaintiffs had been successful in obtaining verdicts that the submission of that testimony would have been reversible error.

It is difficult, therefore, on the face of the record, as above set forth, to see how opposing counsel can make the contention that the conclusion of the jury (assuming that it reached such a conclusion) that the testimony of the fireman and the engineer, who were in a position to know the speed of the train, and the supporting testimony of the Dispatcher "were manifestly and palpably against the weight of evidence" or that the testimony of the defendant's witnesses was false.

In a further effort to press this point, opposing counsel from time to time in his brief, makes reference to certain color slide pictures of a portion of the traingraph, made by opposing counsel after the verdicts for the defendant Railroad Company, at the second trial, and certain supporting affidavits made by him and another, all executed and filed subsequent to the verdicts for the defendant Railroad Company, in support of one of the plaintiffs' grounds for a new trial, to-wit, newly discovered evidence.

Although plaintiffs' attorney knew of the existence of the traingraph and had taken discovery interrogatories concerning it on two occasions prior to the trial, the theory supposedly supported by the color slide and the affidavits referred to, were not presented to the jury during the actual trial, and impressed neither the successor trial judge, Judge Miller, nor the Court of Appeals, as presenting any sort of determinative evidence whatsoever. In the actual trial of the case before the jury, it was opposing counsel's position, as demonstrated by his cross-examination of the defendant's Dispatcher, that estimates of the speed of a train for a distance of a half a mile, on the basis of the traingraph, could vary and were not too reliable, but, now, on the basis of affidavits of himself and others, and a color picture of a minute part of that traingraph, partially obscured by a tiny ink spot, opposing counsel contends that an accurate conclusion of the speed of the train can be made for a distance of only **295 feet**.

The inference contained on page 20 of opposing counsel's brief, that an employee of the Railroad "had blotted out" that tiny portion of the graph is utterly without foundation. Quite naturally a tiny ink blot resulted where one ink pen line crossed another.

The Speed of the Train Is Not the Determinative Issue in This Case.

Even if the jury concluded that the crew was not keeping a proper look-out ahead, or that the train was running

at an excessive rate of speed, nevertheless, there is substantial other evidence in this record, much of it undisputed, that would not only have justified, but would have required verdicts for the defendant Railroad Company, on all counts, that is under the Statutory Count, the Common Law Count and the Count based on the Springfield City Speed Ordinance.

As pointed out hereinabove, the undisputed evidence, including the evidence of the plaintiffs' own witnesses, was that the automobile in which the boys were riding, after stopping at a point of complete safety, "lunged" or "jumped" right into the path of the train when the operator of the car "mashed on the gas". In fact, the right front corner of the engine struck the left front corner of the automobile. If the jury concluded, which they certainly would have been justified in doing, that "the appearance of the automobile upon the railroad track was practically simultaneous with the collision, and no opportunity was afforded the crew of the defendant's railroad train to comply with all of the precautions required, the defendant Railroad Company would not be liable under the Statute. **Gaines v. T. C. Railroad Company,** 175 Tenn. 389, p. 393; **Jones v. Louisville and Nashville Railroad Company,** 192 Tenn. 570. The undisputed evidence seems so overwhelming on this point that we submit that the trial court would have been justified in directing a verdict for the defendant Railroad Company in that connection. Directed verdicts for the defendant on that ground were affirmed in the **Gaines** case, supra, and in the **Jones** case, supra.

With respect to the Counts in the plaintiffs' complaint based on Common Law negligence and on the alleged violation of the Springfield City Speed Ordinance, it is well established, of course, that the plaintiffs' right of action to recover would be completely barred if the deceased were guilty of contributory negligence which was one of

the proximate causes of the accident. **McCampbell v. Central of Georgia Railway Co.**, 194 Tenn. 594, at p. 599. In fact, by a supplemental opinion of the Court of Appeals for the Sixth Circuit, in this case, on a petition for a rehearing on the first appeal the Court of Appeals held that, under the record in that case, it was clear that the operator of the automobile was guilty of contributory negligence as a matter of law, and, if, on the second trial, nothing more was adduced in favor of the plaintiffs that the trial court should direct a verdict for the defendant Railroad Company on the Common Law Count and on the Springfield City Speed Ordinance Count with respect to the case brought for the death of the Farmer boy who was driving the car.

With respect to the case brought for the death of the Farmer boy who was a passenger in the car, of course, it is well established in Tennessee, that a guest is not entitled to rely entirely on the operator of the automobile, but is under some duty to exercise reasonable care for his own safety. (**Crawford v. Nashville etc. Railway**, 153 Tenn. 642.) One of the boys who survived the accident testified that at the time the automobile in which they were riding came to a stop at a point of complete safety, the crossing warning signals were going full blast, the train was approaching in clear view, with its lights glaring into the boys' faces, and the horn of the engine blowing, the Farmer boy, who was riding on the front seat of the automobile shouted to the driver, "Go ahead" (Appellee's Appendix, pp. 55b and 56b).

Thus, irrespective of speed the jury would not only have been justified, but, in our opinion, required to have rejected the plaintiffs' cases, for the reasons immediately hereinabove set forth. The speed of the train was not, therefore, the single determinative issue of fact.

Petitioners' Entire Position Is Prejudicated Upon the Erroneous Position That a Trial Judge in the Federal Court Acts as a "Thirteenth Juror", Should Make His Own Determination of the Credibility of Witnesses Who Appeared Before the Jury, and Should Grant a New Trial if He, the Trial Judge, Had He Been Sitting on the Jury, Would Have Reached a Different Verdict.

The Court of Appeals for the Sixth Circuit, in the case of **Werthan Bag Corp. v. Agnew**, 202 F. 2d 119, in commenting on the trial Judge's remarks that, in the Federal Court, the trial judge did not act as a "thirteenth juror", said:

> "The judge continued: 'It is different in the Federal court. It is a question of whether or not there is substantial evidence here, and not like the State practice (Tennessee), I am not the thirteenth juror, and it is not necessary for me to approve or disapprove a verdict on the record.' This was a correct statement of law, for, though it has long been the rule in Tennessee that the trial judge is a thirteenth juror and unless satisfied with the verdict should set it aside, *no such rule exists in the United States courts.* (Italics added.)
>
> * * * * * * * *
>
> "In Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, the Supreme Court declared: 'Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'"

To the same effect, see **City of Knoxville, Tennessee v. Bailey**, 222 F. 2d 520 (C. C. A. 6); **Peterman v. Indian Motorcycle Company**, 216 F. 2d 289 (C. C. A. ...); **Mahoney v. New York Central Railroad** (C. C. A. 2), 234 F. 2d 929; and **Norfolk So. Ry. Co. v. Dan's Frozen Foods**, 195 F. 2d 662 (C. C. A. ...).

Moore, in his work on **Federal Practice** (Second Edition), Volume 6, page 3818, summarizes the well established law on this point, as follows:

> "There are statements in the cases that, in ruling on the motion, the trial judge acts as a thirteenth juror. Properly understood and applied, no fault can be found with them for the judge does not act to evaluate and weigh the evidence. But while he has a responsibility for the result no less than the jury, he should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of the fact, he would have reached a different result; and in that sense he does not act as a thirteenth juror in approving or disapproving the verdict. And since the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict."

A succinct statement or summary of this principle is also found in **Cyclopedia of Federal Procedure** (Third Edition), Volume 10, p. 79:

> "The testimony is considered in the light most advantageous to the prevailing party and all conflicts in the evidence must be resolved in his favor. *It is not a sufficient ground for a new trial that the verdict is against the preponderance of the testimony, or that the court might have arrived at a different result. The verdict must be manifestly and palpably against the evidence.*" (Italics added.)

CONCLUSION.

The overwhelming weight of the evidence was in favor of the defendant and in support of the jury's verdicts in these cases. Indeed, on the basis of the undisputed testimony, it is extremely difficult to see how the jury could have reached any verdict except for the defendant Rail-

road Company. The transcript of the entire proceedings was written up by the defendant and provided the Court for study when passing upon the plaintiffs' motions for a new trial after the adverse verdicts, in favor of the defendant. This matter was briefed at great length by both counsel. That the verdicts were in accordance with the overwhelming weight of the evidence would be crystal clear to anyone reading the record.

Stripped of all surplusage and all irrelevances, the real and only issue presented by petitioners on this petition for a writ of certiorari, is whether or not the successor trial judge, the Hon. William E. Miller, in reaching the conclusion that he could fairly pass upon the plaintiffs' motions for a new trial, even though he didn't preside at the actual jury trial, itself, all as provided for in Rule 63 of the Federal Rules of Civil Procedure, abused his discretion and acted arbitrarily. The trial judge, himself, decided that he could act with fairness and propriety. The Court of Appeals for the Sixth Circuit, after considering elaborate briefs presented by both sides, and hearing full argument, likewise concluded that the trial judge did not abuse his discretion or act arbitrarily.

It is, therefore, the contention of respondent that the petition for a writ of certiorari is without merit, and that it should be denied.

Respectfully submitted,

JOHN J. HOOKER,
1106 Nashville Trust Building,
Nashville, Tennessee,
Attorney for Respondent.

Of Counsel:
DAVID M. REEBLE,
1106 Nashville Trust Building,
Nashville, Tennessee.

APPENDIX A.

(Filed Feb. 28, 1959, Carl W. Reuss, Clerk.)

Nos. 13,669; 13,670

United States Court of Appeals,
Sixth Circuit.

Floyd Farmer, Adm'r, Appellant,
v.
Louisville & Nashville Railroad Company, Appellee.

Willie Farmer, Adm'r, Appellant,
v.
Louisville & Nashville Railroad Company, Appellee.

Order.

Before Martin, Chief Judge; Simons, Circuit Judge; Mathes, District Judge.

These consolidated appeals came on to be heard on the record and on the briefs and oral arguments of attorneys for the contending parties;

And it appearing that there was substantial evidence to support the jury verdicts in favor of the defendant and that no reversible error inheres in the conduct of the trial by the district judge, or in his charge to the jury; and it appearing further that there is no valid ground for the granting of a new trial on the basis of newly discovered evidence;

The judgment of the district court in each case is affirmed.

/s/ John D. Martin,
United States Circuit Judge.